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MYERS BIGEL SIBLEY & SAJOVEC, P.A.
P.O. BOX 37428
RALEIGH, NC 27627

EXAMINER	
USTARIS, JOSEPH G	

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAUL T. WATSON,
SCOTT R. SWIX, and JAMES H. GRAY

Appeal 2008-0381
Application 10/028,153
Technology Center 2600

Decided: June 19, 2008

Before MAHSHID D. SAADAT, ROBERT E. NAPPI,
and SCOTT R. BOALICK, *Administrative Patent Judges*.

SAADAT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from a final rejection of claims 1-30, which are all of the claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

Appellants' invention relates to content transmission and determining whether to transmit content using a broadcast network or a broadband network.

Claim 1, which is representative of the claims on appeal, reads as follows:

> 1. A method for content transmission network selection in a system coupled in parallel through both of a broadcast network and a broadband network to a viewer location wherein the broadcast network and the broadband network are different, the method comprising the steps of:
>
> identifying video programming content to be transmitted to the viewer location based on a transmission request;
>
> selecting one of the broadcast network or the broadband network for transmission of the video programming content to the viewer location based upon characteristics of the transmission request comprising a future time at which the video programming content is requested to be viewed, the selection based at least in part on an option of delivering the video programming content either at a time that the request is received or at the future time; and
>
> transmitting the video programming content on the selected one of the broadcast network or the broadband network to the viewer location coupled to both of the broadcast and broadband networks.

The prior art applied in rejecting the claims on appeal is:

Ellis (Ellis '790)	WO 99/60790	Nov. 25, 1999
Kaplan	US 6,016,307	Jan. 18, 2000
Rai	US 6,438,110 B1	Aug. 20, 2002 (filed Aug. 26, 1999)
Ellis (Ellis '526)	US 6,766,526 B1	Jul. 20, 2004 (filed Dec. 3, 1999)
Rakib	US 6,889,385 B1	May 3, 2005 (filed Jun. 23, 2000)

Claims 1, 2, 6-11, 14-16, 19, and 22-30 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ellis '526 in view of Ellis '790 and Rai.

Claims 12, 13, 18, and 21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ellis '526, Ellis '790 and Rai and further in view of Rakib.

Claims 3-5, 17, and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ellis '526, Ellis '790, Rai and further in view of Kaplan.

We affirm.

ISSUE

The issue on appeal turns on whether, under 35 U.S.C. § 103, the combination of Ellis '526, Ellis '790, and Rai, as proposed by the Examiner, teaches or suggests the claimed subject matter, and specifically the claimed step of "selecting one of the broadcast network or the broadband network" based on "an option of delivering the video programming content either at a time that the request is received or at the future time."

PRINCIPLES OF LAW

To reach a conclusion of obviousness under section 103, the Examiner bears the burden of producing factual basis supported by teaching in a prior art reference or shown to be common knowledge of unquestionable demonstration. Our reviewing court requires this evidence in order to establish a prima facie case. *In re Piasecki*, 745 F.2d 1468, 1471-72 (Fed. Cir. 1984).

Furthermore, the test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. *See In re Kahn*, 441 F.3d 977, 987-988 (Fed. Cir. 2006), *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991) and *In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734 (2007).

"The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *Leapfrog Enter., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007) (quoting *KSR,* 127 S. Ct. at 1739-40). "One of the ways in which a patent's subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent's claims." *KSR*, 127 S. Ct. at 1742.

ANALYSIS

1. Claim rejection over Ellis '526, Ellis '790 and Rai

Appellants do not dispute the teachings of Ellis '526 with respect to the claimed identifying video programming content to be received. However, Appellants' contentions focus on whether the combination of Ellis '790 and Rai teaches the claimed step of selecting the network at least based

on an option of delivering the programming content at a time the request is received or at the future time (App. Br. 8-9).

With respect to claim 1, Appellants specifically contend that, as acknowledged by the Examiner (Ans. 5), Ellis '790 does not teach or suggest selecting one of a broadcast network or a broadband network for transmission (App. Br. 9; Reply Br. 11). Appellants further assert that Rai relates to reserving network connections in advance and has nothing to do with selecting the network based on an option of delivering the programming content either at a time the request is received or at a future time (App. Br. 9; Reply Br. 11-12).

The Examiner argues that Ellis '790 is relied on for teaching the options available for delivery when video programming is requested on a video distribution network, which comprises a number of different network types (Ans. 12). The Examiner states that such options include those related to delivering the programming content either at a time the request is received or at the future time (*id.*). With respect to Rai, the Examiner asserts that the reference teachings provide for selection among multiple networks for delivery of the video programming (Ans. 13).

We agree with the Examiner's line of reasoning and find that Ellis '790 does describe different options selected by the user for video programming delivery (p. 3, ll. 22-25). Among the delivery options controlled by controller 39 in video server 29 (fig. 2 and 3), is coordinating program broadcast times (p. 11, ll. 7-19). Ellis '790 further discloses using data fields for entering the user's choices such as "program start-time" or "start program now" (p. 23, ll. 6-12; p. 25, ll. 28-32). Rai, on the other hand, focuses on choosing time slots on different connections or networks

available on a communication network (col. 1, ll. 8-11). Rai selects a specific network based on the time and duration of the service (col. 6, ll. 30-37). Rai further discloses a connection schedule including a list of "time slots" associated with data and describing a particular route or routes (col. 6, l. 58 through col. 7, l. 6).

Therefore, one of ordinary skill in the art, when faced with situations that require selecting different options related to delivery of video programming, such as content, start time and duration, and the best route or link from those available in a communications network, would have combined the teachings of Ellis '790 and Rai with those of Ellis '526. Each prior art reference adds additional criteria for selecting the specific option(s) that would satisfy the viewer's requirements.

We also disagree with Appellants that, because Rai provides for time slots in the future (col. 10, ll. 51-54), it is limited to scheduling over a look ahead period (Reply Br. 7). In fact, although Rai provides for a start time in the future, there is nothing in Rai that precludes setting a start time as soon as the request is received over an available link.

Appellants further contend that it would not have been obvious to combine the references since the Ellis references discuss television systems while Rai relates to a computer network (App. Br. 12; Reply Br. 14-15). We agree with the Examiner's analysis of Ellis '526 (Ans. 16) indicating that the program selection, which may be implemented using the user's television based on a personal computer, a WebTV box, a personal computer television, or a handheld computing device (col. 10, ll. 39-43), would also benefit from the computer network of Rai. We also note that Rai allocates network time slots in support of services such as distance learning or

teleconferencing (col. 6, ll. 30-36), which similarly deliver video programming content.

Based on our analysis above, we find no error in the Examiner's position that scheduling a video service over a network such that a specific link is selected based on the requested time slot and duration of Rai would be recognized by the skilled artisan as an obvious enhancement to the selection of options for delivering programming content of Ellis '526 and Ellis '790. According to the *Leapfrog* holding, when combination of familiar elements according to methods known to the skilled artisan achieves a predictable result, such as selecting the network based on the time the programming content is to be delivered, it is likely to be obvious. The combined teachings of Ellis '526, Ellis '790, and Rai present no more than a combination of familiar elements according to known methods, with no unpredictable results. Appellants have not shown, nor do we find, evidence to the contrary.

With respect to claims 25, 27, and 29, Appellants contend the proposed rejections based on the same assertions made with respect to claims 1, 16, and 19 and repeat the argument that it would not have been obvious to combine the references since the Ellis references discuss television systems while Rai relates to a computer network (App. Br. 12; Reply Br. 14-15).

Therefore, for all the reasons discussed above, we sustain the rejection of claims 1 and 25, as well as claims 2, 6-11, 14-16, 19, 22-24, and 26-30 which are argued together with claims 1 and 25 over Ellis '526, Ellis '790, and Rai.

2. Claim rejections over Ellis '526, Ellis '790 and Rai and further in view of Kaplan and Rakib

Appellants do not argue any of the rejections based on the combination of these references. We find the Examiner's rejections based on the additional references to Kaplan and Rakib to be reasonably supported by the factual findings outlined in the Answer, which remain unrebutted by Appellants. Therefore, as the Examiner has set forth a prima facie case of obviousness and for the same reasons discussed above with respect to claim 1, we sustain the rejection of claims 12, 13, 18, and 21 over Ellis '526, Ellis '790, Rai, and Rakib and of claims 3-5, 17, and 20 over Ellis '526, Ellis '790, Rai, and Kaplan.

CONCLUSION

Because Appellants have failed to point to any error in the Examiner's position, we sustain the 35 U.S.C. § 103 rejection of claims 1-30.

ORDER

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. 1.136(a)(1)(iv).

AFFIRMED

KIS

MYERS BIGEL SIBLEY & SAJOVEC, P.A.
P. O. BOX 37428
RALEIGH, NC 27627